

STATE OF MICHIGAN  
IN THE SUPREME COURT

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TOD MCLAIN, Personal Representative of the  
ESTATE OF TRACY MCLAIN,

Plaintiff-Appellant,

v

CITY OF LANSING FIRE DEPARTMENT,  
CITY OF LANSING, and JEFFREY  
WILLIAMS,

Defendants-Appellees

and

MICHAEL DEMPS,

Defendant.

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Supreme Court No. \_\_\_\_\_

Court of Appeals No. 318927

Ingham County Circuit Court  
No. 11-000859-NH

Hon. James S. Jamo

John J. Bursch (P57679)  
WARNER NORCROSS & JUDD LLP  
900 Fifth Third Center  
111 Lyon Street, N.W.  
Grand Rapids, Michigan 49503-2487  
616.752.2000  
jbursch@wnj.com

Courtney E. Morgan, Jr. (P29137)  
MORGAN & MEYERS PLC  
3200 Greenfield Road, Suite 260  
Dearborn, Michigan 48120-1800  
313.961.0130  
cmorgan@morganmeyers.com

*Attorneys for Plaintiff-Appellant*

Karen Elizabeth Beach (P75172)  
PLUNKETT COONEY  
38505 Woodward Avenue, Suite 2000  
Bloomfield Hills, Michigan 48304-5096  
248.901.4098  
kbeach@plunkettcooney.com

*Attorneys for Defendants-Appellees*

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**ESTATE OF TRACY MCLAIN'S  
APPLICATION FOR LEAVE TO APPEAL**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF APPELLATE JURISDICTION

The Court of Appeals issued its published opinion on March 3, 2015. This Court has jurisdiction under MCL 600.215 and MCR 7.301(A)(2) to grant leave to appeal.

## JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellant, the Estate of Tracy McLain, seeks leave to appeal the Michigan Court of Appeals' published decision in *McLain v Lansing Fire Department*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (March 3, 2015) (Docket No. 318927) (Ex A, slip op 1). In the opinion, the Court of Appeals first took this Court's decision in *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 412-413; 716 NW2d 236 (2006)—which granted governmental entities a grace period to file an affidavit of meritorious defense under the Governmental Tort Liability Act—and applied that decision to a completely different statutory scheme, the Emergency Medical Services Act. The Court of Appeals then considered the record evidence of Defendants' gross negligence, discounted the most important evidence suggesting that Defendants improperly intubated Ms. McLain by inserting a breathing tube down her esophagus rather than her trachea and then failed to monitor her oxygen levels, and held that there was no material dispute of fact for purposes of Defendants' MCR 2.116(C)(7) motion.

Mr. McLain, personal representative of Mrs. McLain's estate, respectfully requests that the Court grant leave to appeal. Alternatively, Mr. McLain asks that the Court reverse summarily and direct the trial court to enter summary disposition in the estate's favor or, at a minimum, to conduct a trial on the issue of gross negligence.

## STATEMENT OF QUESTIONS PRESENTED

1. Under MCL 600.2912e, a defendant in a medical-malpractice action must file an affidavit of meritorious defense within 91 days after the plaintiff files an affidavit of merit. In *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 412-413; 716 NW2d 236 (2006), this Court held that a defendant invoking immunity under the Governmental Tort Liability Act, MCL 691.1401, *et seq.*, is excused from filing an affidavit of meritorious defense until after the trial court enters an order denying immunity. Should *Costa* be judicially extended to a completely different statutory scheme, the Emergency Medical Services Act, MCL 333.20901, *et seq.*?

Plaintiff-Appellant says: No.

Defendants-Appellees say: Yes.

The Court of Appeals said: Yes.

The trial court said: Yes.

2. Whether a trial court may weigh circumstantial evidence and resolve credibility determinations at the summary disposition stage when a medical-malpractice plaintiff alleges that a defendant engaged in “gross negligence,” and the defendant claims immunity and files a motion under MCR 2.116(C)(7).

Plaintiff-Appellant says: No.

Defendants-Appellees say: Yes.

The Court of Appeals said: Yes.

The trial court said: Yes.

## STATUTE INVOLVED

MCL 600.2912e(1) states, in relevant part:

In an action alleging medical malpractice, . . . the defendant or, if the defendant is represented by an attorney, the defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney serves the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of meritorious defense shall certify that the health professional has reviewed the complaint and all medical records supplied to him or her by the defendant's attorney concerning the allegations contained in the complaint and shall contain a statement of each of the following:

- (a) The factual basis for each defense to the claims made against the defendant in the complaint.
- (b) The standard of practice or care that the health professional or health facility named as a defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.
- (c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.
- (d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered.

(Emphasis added.)

## INTRODUCTION AND REASONS FOR GRANTING LEAVE

In February 2009, Tracy McLain suffered a respiratory attack and could not breathe. Lansing Fire Department personnel reached the scene and inserted a breathing tube. When Mrs. McLain arrived at the hospital emergency department, hospital personnel determined that the tube was lodged in Mrs. McLain's esophagus rather than her trachea; the tube had been in Mrs. McLain's esophagus for five minutes; and Mrs. McLain was pulseless and unresponsive with dangerously low blood oxygen levels. (Ex B, Henney Dep at Ex 1; Ex C, Post Dep at Exs 1 & 2; see Exs G-I.) Defendants should have realized their mistake long before Mrs. McLain reached the hospital; however, they apparently did not take any vital signs after the intubation or otherwise monitor her oxygen levels. (Ex D, Incident Report; Ex E, Pre-Hospital Care Report.)

Hospital personnel promptly extracted the tube and placed a new tube in Mrs. McLain's trachea. (*Id.*) Almost immediately, Mrs. McLain's vital signs rebounded, her heart began beating normally, and her blood oxygenation soared to near normal levels. But the five-minute delay was too much; Mrs. McLain's brain had suffered irreparable damage due to prolonged lack of oxygen and she eventually died.

Mrs. McLain's husband, Tod McLain, filed this medical-malpractice lawsuit, and Defendants asserted immunity under both the Governmental Tort Liability Act, MCL 691.1401, *et seq.* ("GTLA"), and the Emergency Medical Services Act, MCL 333.20901, *et seq.* ("EMSA"). The trial court held that the GTLA did not provide immunity because the Act waives immunity for medical care, see MCL 691.1407(4), and the court allowed McLain to file an amended complaint that alleged gross negligence, to abrogate immunity under the EMSA. Mr. McLain filed that amended complaint along with affidavits of meritorious claims, as MCL 600.2912d requires. Accordingly, under MCL 600.2912e, Defendants were required ("shall") to file an affidavit of meritorious defense within 91 days.

Defendants did not file any affidavit of meritorious defense but instead filed a motion for summary disposition under MCR 2.116(C)(7), claiming that there was no evidence of gross negligence for purposes of the EMSA. In declining to submit the affidavit, Defendants relied on this Court's decision in *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 412-413; 716 NW2d 236 (2006), which held that a defendant need not file an affidavit of meritorious defense until after resolution of a motion based on the GTLA, not the EMSA. Nonetheless, the trial court granted summary disposition to Defendants.

On appeal, the Court of Appeals noted that although the GTLA is a separate statute from the EMSA, the two laws share a "common purpose" and therefore "should be read in pari materia." (Ex A, slip op 4.) With no further analysis of the reasons undergirding *Costa*, the Court of Appeals simply extended *Costa* and held that a defendant may not lose the benefit of EMSA immunity "merely by failing to timely file an affidavit of meritorious defense." (*Id.* at 5.)

Turning to the merits of the MCR 2.116(C)(7) motion, the Court of Appeals said that Defendant Williams' notes and testimony about where he inserted the breathing tube trumped the hospital's medical progress notes. (*Id.* at 6.) In so holding, the Court of Appeals failed to consider that (1) the discrepancy between the hospital's medical progress notes and Defendant Williams' testimony required a credibility determination and could not be resolved on summary disposition; (2) it was grossly negligent for Defendants to fail to check Mrs. McLain's vital signs and oxygen levels during the five minutes that elapsed between the tube's insertion and her arrival at the hospital emergency room; and (3) the fact that Mrs. McLain's oxygen levels immediately rebounded after her re-intubation at the hospital was strong circumstantial evidence that Defendants had, in fact, placed the breathing tube in Mrs. McLain's esophagus.

This Court's review is warranted. To begin, the Court of Appeals' published opinion is the first appellate decision extending *Costa* beyond the context of the GTLA. The Legislature's command in MCL 600.2912e—that a medical-malpractice defendant “shall” file an affidavit of meritorious defense within 91 days—should not be lightly set aside. And the reasoning in *Costa* for ignoring the statutory requirement does not extend to claims involving the EMSA. This issue of first impression involves a legal principle of major significance to the state's jurisprudence, MCR 7.302(B)(3), involves a substantial question as to the enforceability of a legislative act, see MCR 7.302(B)(1), and is clearly erroneous and will cause material injustice to Mr. McLain, MCR 7.302(B)(5).

This case also presents an opportunity for the Court to clarify the summary disposition standard under MCR 2.116(C)(7). The Court of Appeals improperly resolved a conflict between Defendant Williams' notes and testimony and the hospital's notes, and it disregarded additional evidence—Defendants' failure to check Mrs. McLain's oxygen levels during the five minutes that elapsed between the breathing tube's insertion and Mrs. McLain's arrival at the hospital; the happy coincidence that Mrs. McLain's oxygen levels immediately rebounded immediately after the hospital re-intubated her—that created a material dispute of fact regarding whether Defendants engaged in gross negligence. The issue of how to apply the summary disposition standard when a defendant asserts immunity and files a motion under MCR 2.116(C)(7) is again a principle of major significance to the state's jurisprudence, MCR 7.302(B)(3), and the Court of Appeals' ruling was clearly erroneous and will cause material injustice, MCR 7.302(B)(5).

Mr. McLain respectfully requests that this Court grant leave to appeal. Alternatively, he asks the Court to reverse summarily and either direct entry of judgment in favor of Mr. McLain for Defendants' failure to submit an affidavit of meritorious defense, or direct that summary disposition be denied and a trial be held on the issue of Defendants' gross negligence.

## STATEMENT OF FACTS

This case arises out of the grossly negligent response by Defendant Jeffrey Williams, EMT-Paramedic,<sup>1</sup> to a dispatch on a 911 call for a medical emergency for Tracy McLain. Mr. Williams is a paid employee of the City of Lansing Fire Department and the City of Lansing.

Tracy Marguerite McLain, was a 45-year-old woman who, along with her husband Tod, was at the home of their daughter, Tabbetha McLain, to celebrate their daughter's birthday. (Ex F, McLain Dep 9.) As the three were preparing to leave for dinner, Mrs. McLain experienced a respiratory attack. Tod dialed 911. (*Id.* at 13.) Upon the EMT's arrival, Mrs. McLain was still responsive, but soon thereafter she suffered a respiratory arrest. (Ex D, Incident Report 2-3.)

At 8:16 p.m., Defendant EMT-Paramedic Jeffrey Williams and EMT-Basic Michael Demps began working on Mrs. McLain. Readings were B/P 0, Pulse 0, Rhythm RR, Resp. 0, Effort Normal, SpO2 85. (Ex E, Pre-Hospital Care Report 2.) Critically, there is no record that any additional vital signs were taken or recorded by Defendants throughout Mrs. McLain's time as a patient under their care. (*Id.*)

At 8:20 p.m., Defendant Williams reported that CPR was attempted, endotracheal intubation was attempted and succeeded, and venous access-extremity was attempted and succeeded. (Ex E, Pre-Hospital Care Report 2.) The report of Lansing Fire Department (*id.*) alleges that there was "tube misting," a reliable indication that the ET tube is in the trachea, where it belongs.

Mrs. McLain arrived at Ingham Regional Medical Center a few minutes later, and the hospital's medical records document that the breathing tube was actually in Mrs. McLain's esophagus. (Ex G, History & Physical Report; Ex H, Post Patient Progress Notes; Ex I, Henney

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<sup>1</sup> Under Michigan's Public Health Code, MCL 333.20904(7), an "emergency medical technician" (EMT) means a person "who is licensed by the department [of community health] to provide basic life support." A "paramedic" means a person "licensed under this part to provide advanced life support." MCL 333.20908(5).

Patient Progress Notes.) Moreover, Mrs. McLain was pulseless and unresponsive, with dangerously low blood oxygen levels, and the breathing tube had remained in her esophagus for five minutes. (*Id.*) Accordingly, the hospital promptly extracted the tube and placed a new one in her trachea. (*Id.*) Almost immediately, Mrs. McLain's vital signs rebounded, her heart began beating normally, and her blood oxygenation soared to near normal levels. However, her brain had suffered irreparable damage due to prolonged lack of oxygen. (*Id.*)

Defendant Williams' records (Ex D, Incident Report; Ex E, Pre-Hospital Care Report) report proper placement of the tube without detail. Significantly, the records do *not* reflect that visual checks and repeated vital signs, at the very low end of the technological spectrum, were used, nor were there follow-up readings of SpO<sub>2</sub>, which is a measure of blood oxygen. (Ex E, Pre-Hospital Care Report.) There were no vital signs taken after the intubation, which would have clearly and quickly shown that the tube was *not* delivering oxygen to the patient. (*Id.*) In sum, during the few critical minutes when it could have made a difference, Defendant Williams failed to take steps that would have readily shown he had improperly intubated Mrs. McLain.

Mr. McLain's expert witness, paramedic Robert Krause, M.S., concluded that Mrs. McLain had "a collapse of her airway which the intubation failure does not fix," went into pulseless electrical activity or unresponsiveness, "and remained there until the intubation was corrected in the emergency department." (Ex J, Krause Dep 33, 38-44.) Once Mrs. McLain "was reintubated, she did have a response, a return of spontaneous circulation." (*Id.* at 43-44, 74-75.) In other words, "the airway problem was corrected [at the hospital], the tube was placed appropriately, the medications were then put on board, and because of the correction of the hypoxia, she responded to the medications." (*Id.* at 75.)

In direct opposition to Defendant Williams' report (Ex E, Pre-Hospital Care Report), Mr. Krause opined that "the tube was not placed appropriately [initially], that it, in fact, it was placed

in the esophagus, and that he did not have good lung sounds.” (Ex J, Krause Dep 82.) As Mr. Krause explained, “[t]here are numerous techniques for determining that an intubation has been done improperly and quickly fix the problem” but Defendant Williams “repeatedly failed to take any of them, in failing to follow checklists and protocols, and ultimately in failing to recognize a failed intubation and do anything about it to save this patient’s life . . . .” (Ex K, Krause First-Am Aff of Merit 5-6, ¶ 14.)

Mrs. McLain was hospitalized for several days, but she never came home. Doctors declared her brain dead on February 15, 2009, and she died shortly thereafter. Mr. McLain’s expert pulmonologist, Alvin Bowles, M.D., has opined that “it is more likely than not that Mrs. McLain would have lived and recovered” if Defendants had not been grossly negligent and willfully conducted themselves as alleged in Plaintiff’s Amended Complaint. (Ex L, Bowles First-Am Aff of Merit.)

## PROCEEDINGS BELOW

Plaintiff, Tod McLain, as the duly appointed personal representative for his deceased wife, Tracy McLain, filed a complaint against Defendants Williams and Michael Demps, the City of Lansing, and the Lansing Fire Department<sup>2</sup> on August 8, 2011, alleging medical malpractice. Defendants responded in part by claiming immunity under the GTLA and the EMSA. After the trial court granted summary disposition to Mr. McLain on the GTLA (which waives liability for medical malpractice), the court invited Mr. McLain to file a first-amended complaint that alleged gross negligence to satisfy the EMSA.

Mr. McLain filed his first-amended complaint with amended affidavits of merit on July 2, 2012. (Ex K, Krause First-Am Aff of Merit; Ex L, Bowles First-Am Aff of Merit .) At that

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<sup>2</sup> Since then, Mr. Demps has been dismissed as a party in this case. (Trial Ct Register of Actions No. 75.)

time, he had already moved for summary disposition or default under MCR 2.116(C)(9) and MCR 2.603(A) on the ground that Defendants had failed to provide affidavits of meritorious defense as MCL 600.2912e requires. Defendants filed their summary-disposition responses on June 12, 2012, relying on this Court's decision in *Costa*. The problem is that *Costa* was limited to defenses under the GTLA, and Defendants already knew that the GTLA waived immunity for medical-malpractice actions. Defendants were using *Costa* to avoid submitting an affidavit of meritorious defense in the context of the *EMSA*, a proposition that no Michigan court had previously endorsed. On June 29, 2012, the trial court issued an order that struck the governmental-immunity defense and denied Mr. McLain's motion for summary disposition "for the reasons stated on the record." (Ex M, 6/29/12 Order.) But at the hearing, the trial court gave no reasons why Defendants did not have to file an affidavit of meritorious defense. Nor did the trial court recognize that it had the authority to fashion a remedy for the Defendants' failure to file an affidavit of meritorious defense.

On September 4, 2013, Defendants moved for summary disposition under MCR 2.116(C)(7) and the *EMSA*, which provides qualified immunity to first responders "[u]nless an act or omission is the result of gross negligence or willful misconduct." MCL 333.20965(1). Mr. McLain argued that the evidentiary record met this standard, because the acts of Defendant Williams comprised conduct or a failure to act so reckless that it demonstrated a substantial lack of concern as to whether injury would result. *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994). As paramedic expert Krause concluded, it would not be a gross violation of reasonable care per se to wrongly intubate; but not to follow up, learn that there is a problem, and fix that problem *is* gross negligence, precisely because such conduct evinces a lack of concern for the helpless patient's well-being. (Ex J, Krause Dep 95-96.)

The trial court granted Defendants' summary-disposition motion by an order entered October 16, 2013, "for the reasons stated on the record." (Ex N 10/16/13 Order.) At the hearing on the motion, the trial court had acknowledged that "volumes" of evidence had been submitted by the parties. (Ex O, 9/25/13 Hr'g Tr 42.) But the court said "it really does come down to, in large part, . . . this medical record entry by Dr. [Joel] Post [at the hospital], which sort of sets in motion the suggestion that the [endotracheal] tube was in the esophagus and not the trachea, and whether or not that creates some fact question." (*Id.* at 42-43.) The trial court suggested that the hospital notes might be hearsay, and it concluded that "all we are left with, really, is . . . that it's a credibility issue." (*Id.* at 44.) And the court declined to submit that credibility issue to a jury. (*Id.*) The trial court did not address Mr. McLain's expert testimony, Defendants' failure to monitor Mrs. McLain's oxygen levels, or the fact that Mrs. McLain's oxygen levels jumped dramatically once she was properly intubated at the hospital.

Mr. McLain appealed, and the Court of Appeals affirmed in a published decision. (Ex A, slip op 1.) The Court of Appeals first held, with virtually no analysis, that this Court's decision in *Costa* applied equally to the EMSA. (*Id.* at 4-5.) The Court of Appeals (1) did not address the fact that the narrow judicial exception created in *Costa* related to a defendant's status as a governmental entity or employee; (2) ignored the fact that MCL 691.1407(4), which did not exist in its present form at the time the cause of action in *Costa* occurred, waived governmental immunity for medical care provided by governmental agencies and employees; (3) ignored the fact that this Court in *Costa* did require the filing of an affidavit of meritorious defense by a governmental employee working as an emergency medical provider and thus presumably also covered by the EMSA, once governmental immunity under the GTLA had been removed; and (4) ignored the fact that the EMSA applies to both public and private entities. Instead, the Court of Appeals concluded that the two different immunity provisions " 'share the common purpose of

immunizing certain agents from ordinary negligence and permitting liability for gross negligence’ ” and therefore they may be construed in pari materia, thus greatly expanding *Costa*’s reach and effect. (*Id.*, citation omitted.)

Second, the Court of Appeals decided that Mr. McLain’s “pleadings and offers of proof” had not “created a question of fact regarding whether defendants committed gross negligence or willful misconduct in their medical response to [Mrs.] McLain’s health emergency.” (*Id.* at 6.) The Court of Appeals concluded that “the medical progress notes were dictated by a medical intern, who, by his own admission, did not have direct knowledge of where the tube was located, and did not know from whom he received the information he recorded—including his notation that the tube was located in [Mrs.] McLain’s esophagus.”<sup>3</sup> (*Id.*) By disregarding these hospital notes, the Court of Appeals concluded that Mr. McLain “did not present any testimony to oppose Defendant Williams’ version of events—he simply alleged that they were wrong, [based on Emergency Department records].” (*Id.*)

With respect to Mr. McLain’s critical circumstantial evidence that Mrs. McLain’s oxygen levels jumped once she was properly intubated at the hospital, the Court of Appeals said that the doctrine of *res ipsa loquitor* is unavailable under EMSA. (*Id.* at n 10.) But Mr. McLain never raised that theory of liability; he was using the evidence of the jump in Mrs. McLain’s oxygen levels following re-intubation to create a question of fact as to Defendants’ gross negligence. And the Court of Appeals did not address at all the remainder of Mr. McLain’s proofs and pleadings, such as the numerous expert statements or the critical fact that Defendants failed to monitor Mrs. McLain’s vital signs or oxygen level for several minutes between intubating her and her arrival at the hospital emergency room.

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<sup>3</sup> Inexplicably, the Court of Appeals discounted the hospital records’ value while conceding they were admissible under MRE 803(6). (Ex A, slip op 6 & n 8.) See also MRE 803(4); *Morrow v Boffarding*, 458 Mich 617; 581 NW2d 696 (1998).

## STANDARD OF REVIEW

This Court reviews a summary disposition grant de novo. *Malpass v Dep't of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013). The Court also reviews questions of statutory interpretation de novo. *Rambin v Allstate Ins Co*, 495 Mich 316, 325; 852 NW2d 34 (2014).

## ARGUMENT

### I. **This Court should review whether its decision in *Costa* should be extended to the context of the Emergency Medical Services Act.**

Mr. McLain moved for summary disposition under MCR 2.116(C)(9), or default under MCR 2.603(A), based on Defendants' failure to timely file an affidavit of meritorious defense as MCL 600.2912e requires. The trial court correctly ruled that Defendants cannot "hide behind" the GTLA, MCL 691.1407, to avoid filing such an affidavit. (Ex O, 9/25/13 Hr'g Tr 26.) But the trial court and Court of Appeals both excused the affidavit's absence based on *Costa* and the fact that Defendants were pleading qualified immunity under the EMSA. This Court should grant leave and issue a more reasoned explanation as to whether *Costa* applies in the context of the EMSA. Cf. *Latham v Barton Marlow Co*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_ (April 10, 2015) (Docket No. 148928) (Markman, J, dissenting) ("[T]his Court bears a continuing obligation to the bench and bar, and to those businesses and employees engaged in the . . . industry, to clearly limit the nature and breadth of the . . . exception. The exception is a product of this Court, and it is our responsibility to provide reasonable guidance about what we mean by it. The instant case illustrates well the confusion that the exception has generated.").

*Costa* should not be extended to claims under the EMSA for several reasons. First, the cause of action in *Costa* was subject to GTLA immunity as to some of the defendants and EMSA qualified immunity as to others. Yet, this Court very clearly directed that the governmental

Defendants would need to file an affidavit of meritorious defense once governmental immunity was defeated in that case. In other words, this Court in *Costa* already held by implication that the EMSA was not a ground for a defendant to delay providing an affidavit of meritorious defense. The Court of Appeals' contrary conclusion therefore conflicts with *Costa*. MCR 7.302(B)(5).

Second, the injuries in *Costa* arose in 1999, before the Legislature's 2000 amendment of the GTLA (in 2000 PA 318) to waive governmental immunity based on the provision of medical care. See MCL 691.1407(4). If the Legislature intended to grant governmental employees providing emergency medical services a pass from having to file an affidavit of meritorious defense, waiving governmental immunity based on the provision of medical care was certainly a strange way to accomplish that end.

Third, unlike the GTLA, which grants absolute immunity, the EMSA grants only qualified immunity. So while there are some parallels between the two acts, parties litigating under the EMSA are ultimately going to have to resolve the core question of whether an adverse medical outcome resulted from gross negligence.

Fourth, immunity under the GTLA "is essentially coextensive with . . . common-law immunity." *Ross v Consumers Power Co (On Reh'g)*, 420 Mich 567, 608; 363 NW2d 641 (1984). The same is not true for the EMSA. See generally *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994). The history of and purposes for the two Acts therefore diverge significantly.

In the face of these differences, it was error for the Court of Appeals to judicially extend *Costa* and relieve Defendants of their statutory duty to provide an affidavit of meritorious defense. Under MCL 600.2912e, Defendants were required to submit such an affidavit once Mr. McLain filed his own affidavits of merit. The Legislature's command in MCL 600.2912e

(“shall”) should not so lightly be disregarded. *Dep’t of Agric v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010) (“If the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written.”).

Ironically, if a medical-malpractice claimant misses a notice deadline under the GTLA, the case is over, with no exceptions. Here, Defendants deliberately missed the deadline to file an affidavit of meritorious defense under MCL 600.2912e and suffered no adverse consequences whatsoever. The Court of Appeals suggested that Mr. McLain was attempting to enforce a “hollow proceduralism,” contrary to *Costa*. (Ex A, slip op 5.) But an affidavit of merit is no hollow proceduralism when the law requires a medical-malpractice *plaintiff* to provide one; the courts should not characterize such an affidavit as a hollow proceduralism when the law requires a *defendant* to provide one either. Leave to appeal is warranted.

**II. This Court’s review is necessary to clarify the proper summary disposition standard when a defendant claims immunity and moves for summary disposition under MCR 2.116(C)(7).**

Defendants acknowledged in their summary disposition briefing in the trial court that Mr. McLain’s First-Amended Complaint did adequately plead the gross-negligence or willful-misconduct exception to the EMSA, MCL 333.20965. (Defs’ Summ Disp Br 8.) Because all parties relied on extensive evidence outside the pleadings to litigate the issue of gross negligence, Defendants’ motion under MCR 2.116(C)(7) should have been evaluated under the same standard as MCR 2.116(C)(10). Under that standard, the trial court must consider the pleadings, depositions, affidavits, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). And questions turning on the credibility of a witness cannot be resolved on a

motion for summary disposition, because a fact finder need not accept as true all uncontradicted testimony. *Yonkus v McKay*, 186 Mich 203, 211; 152 NW 1031 (1915); *Rogers v Detroit*, 340 Mich 291, 297; 65 NW2d 848 (1954).

The decisions below demonstrate the urgent need for this Court to clarify that these basic summary-disposition standards apply equally when a defendant asserts immunity and moves for summary disposition under MCR 2.116(C)(7) rather than under MCR 2.116(C)(10). The Court of Appeals held that Mr. McLain “unconvincingly argues that his pleadings and offers of proof created a question of fact regarding whether defendants committed gross negligence or willful misconduct in their medical response to McLain’s health emergency.” (Ex A, slip op 6.) The Court of Appeals reached that conclusion despite a blatant conflict between Defendant Williams’ notes and testimony (asserting that the breathing tube was properly placed in Mrs. McLain’s trachea) and the treating hospital’s notes (asserting that the breathing tube was improperly placed in Mrs. McLain’s esophagus).<sup>4</sup> Contrary to the Court of Appeals’ conclusion, this conflict alone was sufficient to create a question of fact as to whether Defendants had immunity from suit.<sup>5</sup>

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<sup>4</sup> The Court of Appeals acknowledged that these hospital notes were likely admissible under MRE 803(4), and that the trial court made an error by questioning admissibility. Nevertheless, the panel usurped the jury’s province by inexplicably downgrading said evidence on the basis that the author lacked firsthand knowledge of what happened. (Ex A, slip op 6 & n 8.)

<sup>5</sup> The present case is very different from this Court’s recent decision in *Luckett v Southeast Macomb Sanitary Dist*, \_\_ Mich \_\_; \_\_ NW2d \_\_ (April 10, 2015) (Docket No. 149229), where the contested issue of fact was whether pier lights were illuminated at the time of a snowmobile accident. The defendant’s log said the lights were on 20 minutes before the accident, and the only contrary evidence came from witness testimony that indicated the lights were off sometime after the accident. Here, the hospital notes provided contemporary evidence that Mrs. McLain’s breathing tube was misplaced. And the fact that Defendant Williams failed to check Mrs. McLain’s oxygen levels between the time the tube was placed and her arrival at the hospital is additional independent evidence of gross negligence. Unlike the plaintiff in *Luckett*, who was driving a snowmobile in the dark with no lights on, Mrs. McLain was the definition of a blameless and helpless victim, completely dependent on Defendant Williams for her life.

The Court of Appeals' misapplication of the proper standard is even more evident when considering additional record evidence that makes no appearance in the Court of Appeals' opinion. For example, the fact that Mrs. McLain's oxygen levels immediately jumped once she was properly intubated at the hospital is strong circumstantial evidence that the hospital's notes about the breathing tube's location were correct, and that Defendant Williams was simply wrong. In an ordinary (C)(10) context, it would not even be a debatable issue that such a factual dispute must be submitted to a fact finder. It should make no difference that the same factual dispute arises here in a (C)(7) context.

Similarly, the Court of Appeals does not discuss at all the point that Defendant Williams failed to check Mrs. McLain's vital signs from the time of initial intubation until her arrival at the hospital several minutes later. In a (C)(10) context, that fact would clearly have created a jury-submissible issue on the question of gross negligence. Yet the Court of Appeals disregarded that evidence altogether, presumably because this is a (C)(7) case.

In other words, taking the facts in a light most favorable to Mr. McLain, Defendant Williams never performed any vital-sign check to determine if the breathing tube he had inserted was providing needed oxygen to her tissues or not. *Regardless of whether the tube was lodged in Mrs. McLain's esophagus or trachea*, reasonable minds could at least differ as to whether mere intubation—with nothing more for several minutes to determine whether the intubation was successful—is conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Critically, Mr. McLain does not claim that the mere improper placement of the breathing tube was gross negligence (though a fact finder may so conclude). Rather, Mr. McLain has consistently argued that having improperly placed the tube, Defendant Williams engaged in gross negligence by failing to observe the tube's placement or to perform simple vital-sign checks to

determine that fact. It is the failure to perform these observations *at all* which constitutes a reckless disregard for whether an injury (brain damage due to hypoxia) would occur.<sup>6</sup>

Mr. McLain respectfully submits that, 20 years after *Jennings*, this case squarely asks this Court to resolve the important questions of how a trial court should proceed in resolving material disputed questions of fact when a defendant files an MCR 2.116(C)(7) motion and claims immunity. The Court should hold that, just like on a motion under MCR 2.116(C)(10), the evidence must be construed in favor of the non-moving party, and material disputes of fact or credibility determinations must be submitted to a fact finder. The ample record evidence in this case makes clear that the issue of Defendants' gross negligence could be resolved only by a jury.

**A. Mrs. McLain's post-reintubation blood gas values, Dr. Bowles' amended affidavit of merit, the Life Support Manual, and Defendants' failure to use even basic methods to verify intubation placement all create questions of material fact.**

Admissible evidence was submitted in opposition to Defendants' summary disposition motion, including the Emergency Room records and an affidavit and deposition from an expert witness. In deciding an MCR 2.116(C)(7) motion invoking immunity, a trial court must consider all of this evidence as well as the pleadings. MCR 2.116(G)(5); *Coleman v Kootsillas*, 456 Mich 615, 618; 575 NW2d 527 (1998) (proprietary function exception to governmental immunity); *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994) (gross negligence exception). And "the contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant." *Sewell v Southfield Pub Schs*, 456 Mich 670, 674; 576 NW2d 153 (1998); *Patterson*, 447 Mich at 434, n 6.

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<sup>6</sup> Notably, the hospital's emergency department record states that the breathing tube had been in the esophagus for about five minutes. (Ex G, History & Physical Report; Ex H, Post Patient Progress Notes; Ex I, Henney Patient Progress Notes.) This information as to the duration of the esophageal intubation could only have come from Defendant Williams or one of the other EMTs present in the field and actually understated the period of O2 deprivation by four minutes.

Here, the disputed facts cannot be reconciled as a matter of law. Accordingly, Mr. McLain was entitled to a trial.

Defendant Williams testified that once someone is intubated, placement of the tube is confirmed with “Lung sounds, you look for chest rise, look for abdominal distention, CO<sub>2</sub>, capnography, and sometimes you can use an O<sub>2</sub> sensor, *watch their O<sub>2</sub> level rise.*” (Ex P, Williams Dep 44 (emphasis added).) This last item—“watch their O<sub>2</sub> level rise”—is quite telling, as it is a more or less objective, observable, and verifiable measure of the effectiveness of the intubation. Yet in this case, no such measurements were attempted in the field, post intubation, for nine minutes. Instead, Defendant Williams relied solely on his allegedly subjective appreciation of “mist in the tube.”

There is substantial circumstantial evidence that the outcome would have been different if Defendant Williams had simply monitored Mrs. McLain’s oxygen levels, as he himself indicated would have been proper. When the misplaced tube was finally removed and a new one properly placed, the Emergency Department personnel immediately saw a rise in Mrs. McLain’s oxygen levels. Sadly, the medical personnel also recorded that the patient’s brain tissue had been damaged by prolonged lack of oxygen. Taken together, this evidence created a material dispute of fact as to whether Defendant was grossly negligent.

Defendants have essentially argued that Williams at worst did nothing and therefore would be merely negligent, not grossly negligent. This line of thinking is perpetuated by Captain Margaret Murphy, who was the officer in charge of the run to the McLains’ daughter’s home, and then to the hospital on February 7, 2009. Incredibly, Captain Murphy dodged a simple question of whether the first thing to do in the situation of a non-responding intubated patient is to determine whether the intubation has been done improperly. (Ex Q, Murphy Dep 66-67.) Instead, she testified, “There would be no reason to believe it was not done correctly if we had

equal chest rise and the lung sounds were present and bagging was not inhibited. There would be no reason to suspect that that was improper.” (*Id.* at 67.)

This assertion is contradicted by what happened to Mrs. McLain when the breathing tube was properly placed at the hospital. Her vital signs quickly rebounded into the normal range, albeit too late to spare her brain from irreparable damage. This circumstantial evidence again creates a dispute of fact that should have led the trial court and Court of Appeals to conclude that a trial was necessary.

In addition, Williams’ report, written at the hospital, suggests that the intubation was perfectly normal and worked well. But he wrote these things *after* the hospital had already determined that the breathing tube was out of place and Mrs. McLain was known to be brain damaged due to a lack of oxygen. Why would Williams fail to note this important information in his report? A reasonable juror could conclude that Defendant Williams placed the breathing tube in Mrs. McLain’s esophagus, did not realize it, failed to check for proper placement so that he could correct the problem, and never checked vital signs or oxygen levels. He had every incentive not to question his own performance when documenting what happened.

Simply put, the gravamen of Mr. McLain’s claim is *not* that Defendant Williams was grossly negligent in how or where he placed Mrs. McLain’s breathing tube. Rather, Mr. McLain contends that after Williams placed the tube, he failed to take basic steps—such as monitoring oxygen levels—that would have immediately demonstrated there was a serious problem. This failure is gross negligence, *i.e.*, conduct so reckless as to demonstrate a substantial lack of concern whether an injury results. Failure to inspect a breathing tube after placement, where the tube is essential to support life and a mistaken can be so easily made, is reckless disregard for whether an injury due to oxygen deprivation occurs.

Additional evidence further supports the conclusion that Mr. McLain's proffered evidence required the trial court to submit the issue of gross negligence to a jury. For example, consider the deposition testimony of Dr. Jason Henney, a resident who attended Mrs. McLain. Dr. Henney does not remember treating Mrs. McLain, separate and distinct from the medical chart. (Ex B, Henney Dep 41-43.) Although Dr. Henney was not a retained expert in this matter, he testified about the general training of ER physicians as follows:

A. \* \* \* [W]e're taught that the primary order of resuscitation is airway, breathing, circulation. So airway would be the first thing, when a patient comes in that is coding, to be sure we have a proper airway.

Q. Okay.

A. So if I was the person that saw this patient that came in in respiratory arrest, that would have been the first thing that I would have tried to confirm was we had a secure airway.

Q. Okay.

A. And then how I would have gone about is the things that I had mentioned, checking oxygenation saturations, breath sounds bilaterally, fogging of the tube. You can use end tidal CO2 and even just taking a direct look into the oral pharynx to see if you can visualize whether the tube is in the right place.

Q. Okay. And when you find that a tube is in the esophagus, what do you do?

A. You take it out and try to put one in the trachea.

(*Id.* at 46-47.)

Plaintiff is not suggesting that Dr. Henney supplies the standard of care in this matter for paramedics, including Defendant Williams. But Dr. Henney explains that even basic visualization of the oral pharynx would have shown Defendant Williams, or his supervisor, Captain Murphy, that the tube was not placed properly for intubation. That observation would have allowed for prompt correction, proper intubation, and saving Mrs. McLain's life (without

significant brain damage). That more than satisfies the factual exception to the EMSA for Defendants' gross negligence or willful misconduct.

Mr. McLain's expert paramedic, Robert C. Krause, also noted that Mrs. McLain had pulseless electrical activity (PEA), that is, heart activity that does not produce a pulse. (Ex J, Krause Dep 33, 38-44.) Defendant Williams contended in his testimony that PEA has no relationship to an improperly performed intubation and they have "[n]othing to do with each other". (Ex P, Williams Dep 91-92.) But Mr. Krause provided the Advanced Cardiovascular Life Support Provider Manual, put out by the American Heart Association. (Ex R, Krause Dep Ex 5.) According to the American Heart Association's description, the life support manual "is designed for healthcare professionals who either direct or participate in the management of cardiopulmonary arrest and other cardiovascular emergencies." That respected manual for paramedics and other emergency medical service providers shows "hypoxia" as a contributor to Pulseless Electrical Activity (which is a form of unresponsiveness by the patient). As Mr. Krause testified:

[T]hat document clearly ties in and refutes testimony by Mr. Williams. The purpose of this document clearly shows the direct connection between pulseless electrical activity and hypoxia being a contributing factor.

(Ex J, Krause Dep 33-36; Ex R, Krause Dep Ex 5.)

In fact, the Life Support Manual instructs EMTs to check for sources of hypoxia which, among others, would be a failed intubation. (Ex J, Krause Dep Ex 5 at 54-56, 59.) An intubation tube in the esophagus is, by definition, failed intubation. Yet Defendant Williams testified, to his understanding, there was no relationship between a failed intubation and PEA. (Ex P, Williams Dep 91-92.)

Expert Paramedic Krause appropriately identifies the problem with this attitude expressed by Defendant Williams, and why he believes that the tube was improperly placed outside the hospital, contributing to Mrs. McLain's death:

So Captain Murphy identifies the problem here, the most likely being hypoxia. But then she goes on to say, but by doing, but treating the symptom in this case rather than determining the cause is the best course of treatment with a short transport time. [7] Now, that is so below the standard of care, it is so far outside the acceptable treatment modalities, that that is where the American Heart Association says if you're going to fix PEA, you need to fix the problems that are causing it. I can give you an analogy...[if] you have a paper in the basement of your house that breaks. And...this pipe is flowing a hundred gallons of water...a pump that moves 30 gallons of water a minute...is not going to stop...[the flooding]."

\* \* \*

ABGs were drawn and revealed an atrial pH of 7.1. That's a patient who's acidotic. The normal pH is .3, 7.3 to 7.4. This patient, Ms. McLain, is acidotic.

What's also indicative is her PCO2 is 67.4. That's very high. The normal range is anywhere from 35 to 45. If Ms. McLain had been appropriately intubated as you suggest, then I would not—I would not believe that she would have a PCO2 of 67.4.

(Ex J, Krause Dep 36-37, 41.)

While there is a typographical error in the PO2 level (where the maximum value is 100), the likely reading of 51.2 means, "to suggest that she had a proper endotracheal tube placement doesn't correlate. She wouldn't have a PO2, a saturation level of 51 percent." (*Id.* at 42-43.)<sup>8</sup>

If a jury accepts expert Paramedic Krause's analysis, then even the stringent *Jennings v Southwood* standard for gross negligence is met without difficulty. Mr. Krause's credentials to testify on these issues include training on this subject in paramedic school and continuing educa-

<sup>7</sup> See Ex Q, Murphy Dep 66-67.

<sup>8</sup> These laboratory values were taken from the lab work done at the hospital upon Mrs. McLain's arrival. The trial court and Court of Appeals ignored them, as well as Krause's testimony based thereon.

tion, and in fact, Defendants' own paramedic expert testified that this type of thing is part of their training. (Ex S, Hammond Dep 76, 83-85, 87-89, 92, 99-100, 109-112.) Yet the trial court and Court of Appeals ignored Krause's testimony. Moreover, and critically, Plaintiff's causation expert is Dr. Al Bowles, a well-qualified pulmonologist. Consistent with his affidavit (Ex L, Bowles First-Am Aff of Merit 12), it is anticipated that Dr. Bowles would testify at trial that endotracheal placement in a proper fashion does not correlate to the oxygen saturation readings shown in Mr. Williams' "charting."

Consistent with his first amended affidavit of merit (Ex K, Krause First-Am Aff of Merit 11), Paramedic Krause testified that Defendant Williams was grossly negligent in the performance of his duties. (Ex J, Krause Dep 95-96.) In fact, Krause testified that he has experience telling a lawyer that he cannot assist on a case because the actor did not commit gross negligence. (*Id.* at 101-102.) But in the instant matter, Paramedic Krause believed there to be gross negligence before counsel ever even mentioned the concept. (*Id.* at 95-96, 100.)

In many respects, Defendants' standard of care expert, Gregory Hammond, agreed with Paramedic Krause. (E.g., Ex S, Hammond Dep 76, 84-85, 87-89, 92, 99-100, 102-103, 146, 150, 159-160, 168, 181-183, 185, 190-192, 199-201, 213-214, 218-219.) Paramedic Hammond essentially acknowledged that Defendant Williams' record keeping is "not complete", but he's known EMTs like that, and while they are not strong at computers and paperwork, they are excellent at saving lives, which is what really counts. (*Id.* at 200-201, 217.) Hammond's own paramedic training and the training that he gives, however, "is always stressing the importance of a complete and accurate report." (*Id.* at 88-89, 92.) Defendants' expert only provided conclusory "support" for Defendant Williams' adherence to the standard of care (*Id.* at 213), not supported in evidence that can refute expert Paramedic Krause's findings. The deposition of Paramedic Hammond took seven hours, and clearly he had no actual evidence or expert opinion

supporting the case of the Defendants, other than speculation, based on Defendant Williams' admittedly incomplete report.

Finally, Mr. McLain produced an expert pulmonologist, Dr. Alvin Bowles, who has submitted his own first amended affidavit of merit (Ex L, Bowles First-Am Aff of Merit 12). It is anticipated that Dr. Bowles will testify at trial consistently with his affidavit that, had Mrs. McLain been intubated properly in the ambulance, she more likely than not would have lived, and would not have suffered the brain damage that she suffered before her death. In fact, the PEA did resolve itself when she was properly intubated at the hospital, but there was too much damage done, and thus, it was too late for her. The reality is that, had Mrs. McLain been properly intubated earlier, she more likely than not would have lived and not suffered brain damage.

These facts, viewed in the light most favorable to the non-movant Plaintiff, sound in gross negligence, and thus the Defendants should not benefit from the immunity they would otherwise be provided by the EMSA. The trial court's handling of this issue was deeply flawed due, in part, to a lack of clear guidance from this Court on how to decide an MCR 2.116(C)(7) summary disposition motion when a defendant claims immunity. The trial court relied exclusively on Defendants' self-serving report and declined to reconcile that report's inconsistency with the other circumstantial evidence Mr. McLain presented. In deciding a (C)(7) motion, just like deciding a (C)(10) motion, a trial court should construe all facts in a light most favorable to the non-moving party and must decline to resolve any disputed questions of material fact. That did not happen here. Leave to appeal or summary reversal is warranted.

**B. Defendant Williams' credibility has been shown to be questionable, at best.**

Defendant Williams also has placed his own credibility in question. As explained above, the record evidence demonstrates that there are credibility issues surrounding Defendant Williams' testimony (Ex S, Williams Dep 14) and the circumstances of his creation of his ambu-

lance report (Ex E, Pre-Hospital Care Report 6). These credibility issues themselves demonstrate the importance of accurate medical records, including in the field of medical emergency services.

Defendant Williams, and only Defendant Williams, claims to have seen misting in the tube. This finding is vital to his defense. But the hospital Emergency Room records, the jump in Mrs. McLain's oxygen levels once she was re-intubated, and Mr. McLain's expert's evidence all indicate that Williams' assertion is false. If a jury is entitled to disbelieve un rebutted testimony, see, *e.g.*, *People v Mindeman*, 157 Mich 120; 121 NW 488 (1909) (undisputed testimony of any witness the jury disbelieved), *White v Taylor Distrib Co*, 482 Mich 136; 753 NW2d 591 (2008) (defendant's inconsistent statements created issues of material fact precluding summary disposition), then clearly rebutted testimony cannot form the basis for summary disposition under MCR 2.116(C)(7).

**C. The gross negligence exception to emergency medical services immunity applies on this record.**

Overcoming the statutory liability immunity provided by the EMSA, MCL 333.20965(1), requires that a plaintiff prove a level of gross negligence, or willful conduct. The first amended complaint and first amended affidavits of merit so plead, and the evidence supports this standard.

For purposes of reviewing this summary disposition record, *Jennings*, 446 Mich 125, provides the standard for gross negligence as being "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Viewing the record evidence in the instant matter most favorably to the non-movant, Defendants' alleged conduct is so reckless as to demonstrate a substantial lack of concern for whether an injury results. Reasonable jurors could make such a finding, and MCL 333.20965 does not dispose of this case in a vacuum, because there are fact questions that determine whether Defendants' conduct rises to the level of gross negligence.

Defendants argued in the Trial Court, “Plaintiff has no proof the testing was not done.” (Defs’ Summ Disp Br 10.) That argument disregards the fact that the hospital staff found the endotracheal tube in the wrong place right after Mrs. McLain arrived in the ER; that her vital signs and oxygen levels dramatically improved when she was reintubated; and that Ms. McLain’s profound brain damage is proof of an extended period of hypoxia. (Exs. G-L.)

Based on the lack of documentation in Defendant Williams’ report, Mr. McLain also alleges that Williams did not continue monitoring Mrs. McLain’s vital signs. There is no contradiction of substance on the record to that. The business record statute, MCL 600.2146, provides that the “lack of an entry regarding an act, transaction, occurrence, or event in a writing or record so proved *may be received as evidence* that the act, transaction, occurrence, or event did not, in fact, take place.” (Emphasis added.) Similarly, an exception to the hearsay rule, MRE 803(7), referring to the business records exception, MRE 803(6), provides:

*(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, **unless the sources of information or other circumstances indicate lack of trustworthiness.** [Emphasis added.]

Once again, we are drawn back to Williams’ report (Ex E, Pre-Hospital Care Report 6). If he properly placed the tube, and “saw misting”, why then did he not record any vital signs showing the patient’s condition? Why no assessment of blood oxygen saturation? Such monitoring very well could have saved Mrs. McLain’s life. And that amounts to gross negligence under the circumstances. As expert Krause notes, symptoms were allegedly treated, but no attempt to find the cause of the Pulseless Electrical Activity (PEA) was launched. (Ex J, Krause Dep 33-36.) Paramedic Krause noted that it is not a gross violation per se to wrongly intubate.

But not to follow-up, learn that there is a problem, and fix that problem *is* gross negligence by any definition. (*Id.* at 95-96, 100.)

In sum, every one of the allegations in the first amended complaint and first amended affidavit of merit of Paramedic Krause (Ex K, Krause First-Am Aff of Merit 11) supports a finding of gross negligence. Together, the acts of Defendant Williams comprise conduct or a failure to act so reckless that it demonstrates a substantial lack of concern as to whether injury would result. As for willful conduct, the Plaintiff continues to assert that Defendant Williams willfully reported the results of tests not actually performed, and a reasonable juror from the facts and circumstances in this case, could so conclude, and likely will conclude accordingly.

Under the circumstances of this case, the trial court should have refrained from weighing the evidence and credibility of witnesses and left them for the finder of fact to decide. Because there is a wealth of evidence showing that Defendants were grossly negligent, the emergency medical services immunity may not be decided on summary disposition and questions of Defendants' gross negligence should be resolved by the jury. This Court should grant leave and make clear that trial courts resolving an MCR 2.116(C)(7) motion cannot be in the business of making credibility determinations and resolving disputed questions of fact.

## **CONCLUSION AND RELIEF REQUESTED**

This case presents two issues of substantial significance to state jurisprudence: whether this Court's decision in *Costa* should be extended beyond the GTLA to the EMSA context, and the proper standard for resolving a summary-disposition motion under MCR 2.116(C)(7). Mr. McLain respectfully requests that the Court grant leave and address both these issues on the merits. Alternatively, Mr. McLain asks that the Court reverse summarily and either direct entry of judgment in favor of Mr. McLain for Defendants' failure to submit an affidavit of meritorious

defense, or direct that summary disposition be denied and a trial be held on the issue of Defendants' gross negligence.

Respectfully submitted,

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WARNER NORCROSS & JUDD LLP

By /s/ John J. Bursch

John J. Bursch (P57679)  
900 Fifth Third Center  
111 Lyon Street, N.W.  
Grand Rapids, Michigan 49503-2487  
616.752.2000  
jbursch@wnj.com

Courtney E. Morgan, Jr. (P29137)  
MORGAN & MEYERS PLC  
3200 Greenfield Road, Suite 260  
Dearborn, Michigan 48120-1800  
313.961.0130  
cmorgan@morganmeyers.com

*Attorneys for Plaintiff-Appellant*

12594214